

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TERRANCE R. HAWBAKER**

Claimant

VS.

**JAMES R. TURNBULL PAINTING**

Respondent

AND

**INSURANCE COMPANY OF NORTH AMERICA**

Insurance Carrier

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Docket No. 184,632

**ORDER**

Claimant appealed the Award dated June 5, 1997, entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on November 4, 1997.

**APPEARANCES**

Henry O. Boaten of Topeka, Kansas, appeared for the claimant. Michael W. Downing of Kansas City, Missouri, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record and the parties' stipulations are listed in the Award.

**ISSUES**

Terrance R. Hawbaker, the claimant, sandblasted and painted bridges for the respondent, James R. Turnbull Painting, for approximately 17 years. He now alleges he has permanent residual effects from lead exposure and that he injured his left shoulder, developed bilateral carpal tunnel syndrome, and sustained hearing loss, tinnitus, and dizziness as a result of working for Turnbull Painting.

The Administrative Law Judge (1) found that Mr. Hawbaker did not sustain either permanent impairment or reduced earning capacity as a result of the lead exposure, (2) denied benefits for the left shoulder injury because Mr. Hawbaker failed to provide timely

notice of accident, (3) denied benefits for bilateral carpal tunnel syndrome because Mr. Hawbaker failed to provide timely notice of accident and timely written claim, (4) denied benefits for hearing loss and tinnitus because Mr. Hawbaker failed to provide timely notice of accident and timely written claim, and (5) awarded Mr. Hawbaker temporary total disability benefits for 54 weeks based upon a \$672.17 average weekly wage.

The issues now before the Appeals Board on this appeal are:

- (1) Did Mr. Hawbaker provide Turnbull Painting with timely notice of accidental injury for the left shoulder injury?
- (2) Did Mr. Hawbaker provide timely notice of accidental injury and serve timely written claim on Turnbull Painting for the bilateral carpal tunnel syndrome condition?
- (3) Did Mr. Hawbaker provide timely notice of accidental injury and serve timely written claim for the hearing loss and tinnitus conditions?
- (4) What is the nature and extent of Mr. Hawbaker's injuries and disability?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Terrance R. Hawbaker worked for Turnbull Painting sandblasting and painting bridges for approximately 17 years. He now alleges he was exposed to lead and has permanent impairment as a result of that exposure and that he injured his left shoulder, developed bilateral carpal tunnel syndrome, and developed hearing loss and tinnitus while working for Turnbull Painting.
- (2) In June 1993, a blood test indicated Mr. Hawbaker had an industrial exposure to lead. The parties stipulated Mr. Hawbaker did develop an occupational disease that arose out of and in the course of his employment with Turnbull Painting through June 30, 1993, as the result of lead exposure.
- (3) Once the company learned of the blood test results, it took measures to place Mr. Hawbaker in jobs that would decrease his exposure to lead.
- (4) Other than having an occasional blood test to monitor the blood lead level, Mr. Hawbaker has not received medical treatment for the lead exposure. He, however, now requests authorization for treatment.

(5) Over a period of time Mr. Hawbaker developed symptoms in his left shoulder. According to his testimony at his January 1994 deposition, Mr. Hawbaker began having severe left shoulder pain in September 1993 that would awaken him at night. The increase in left shoulder symptoms coincides with the period Mr. Hawbaker was shoveling sand.

(6) Mr. Hawbaker worked for Turnbull Painting until October 2, 1993, when the company stopped working for the season.

(7) On October 6, 1993, Mr. Hawbaker presented a written claim form to the company owner, James R. Turnbull. Shortly thereafter, Mr. Hawbaker prepared an accident report form he had obtained from the State and mailed it to the company's workers compensation insurance carrier who received the report on October 29, 1993. That report indicated Mr. Hawbaker had a hernia from lifting heavy scaffolding, a rotator cuff or tendon problem in the left shoulder from sandblasting, and a high level of lead in his blood. The date of accident shown in that report was "Last of June." The report, however, did not mention any problems with either arm or his hearing.

(8) On November 8, 1993, Mr. Hawbaker first consulted a doctor concerning his left shoulder complaints. The doctor, board-certified orthopedic surgeon William H. Gondring, M.D., immediately recommended surgery to repair the torn rotator cuff. Because it wanted a second opinion, the insurance carrier referred Mr. Hawbaker to orthopedic surgeon L. F. Glaser, M.D. By letter dated March 25, 1994, Dr. Glaser notified the insurance carrier that Mr. Hawbaker had a torn rotator cuff in the left shoulder and probable left carpal tunnel syndrome.

(9) Mr. Hawbaker did not learn until March 1994 that he had injured his left arm or that he had developed carpal tunnel syndrome. Before March 1994, he believed the tingling in his hands and fingers was caused by lead poisoning. The doctor's notes indicate Mr. Hawbaker first complained to Dr. Gondring on March 10, 1994, of nighttime numbness. Because of that complaint, the doctor scheduled a nerve conduction study for the left arm. The test, which was administered in late March 1994, indicated compression of the left median nerve. The doctor then diagnosed left carpal tunnel syndrome.

(10) On April 6, 1994, Dr. Gondring operated on Mr. Hawbaker's left shoulder and left wrist to repair both the rotator cuff and release the ligament in the wrist.

(11) While Mr. Hawbaker was recuperating from his surgeries, Dr. Gondring determined that he should have a nerve conduction study on the right. Right hand and arm complaints are first mentioned in the doctor's office notes dated July 28, 1994. As of the date Mr. Hawbaker last testified, he had not received treatment for right carpal tunnel syndrome. He now requests treatment for that injury.

(12) On December 16, 1993, Mr. Hawbaker filed an application for hearing with the Division of Workers Compensation stating he had lead poisoning and a left rotator cuff

injury. The application did not mention any injury to either arm or a problem with his hearing.

(13) On June 20, 1996, Mr. Hawbaker filed an amended application for hearing with the State alleging hearing loss, dizziness, tinnitus, and bilateral carpal tunnel syndrome.

(14) Since Dr. Gondring released Mr. Hawbaker to return to work as of October 21, 1994, he has worked approximately four months for a different employer. In September 1995, he obtained a job paying \$7 per hour where he operated a hydraulic scaffold truck and flagged traffic.

(15) Mr. Hawbaker had a hearing loss before he began working for Turnbull Painting. During his employment with Turnbull Painting, he did not report to his supervisor or the owner that his hearing was worse or that he attributed his hearing difficulties to his work. Neither Turnbull Painting nor its insurance carrier were aware Mr. Hawbaker was contending he had a work-related hearing loss until he amended his application for hearing in June 1996.

(16) During his employment with Turnbull Painting, Mr. Hawbaker did not report to his supervisor or the company owner that he had injured his arms or was having symptoms in his hands or arms that he attributed to his work. Neither Turnbull Painting nor its insurance carrier were aware Mr. Hawbaker had an arm injury until late March 1994 when the insurance carrier received the medical report from Dr. Glaser indicating Mr. Hawbaker had a torn left rotator cuff and probable left carpal tunnel syndrome.

(17) Occupational medicine physician P. Brent Koprivica, M.D., examined Mr. Hawbaker in both March and April 1996. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), he concluded Mr. Hawbaker has a 24.4 percent hearing impairment in the right ear and a 37.5 percent hearing impairment in the left ear for the hearing loss, which converts to a 9 percent whole person impairment. For tinnitus and dizziness, the doctor believes that Mr. Hawbaker has an additional 5 to 10 percent whole person impairment. For the left shoulder injury, the doctor assigned a 20 percent left upper extremity impairment, which converts to a 12 percent whole person impairment. For the bilateral carpal tunnel syndrome, he assigned a 20 percent impairment for the unoperated right upper extremity and a 15 percent impairment for the left. Combining those percentages, Dr. Koprivica believes Mr. Hawbaker has a 40 to 43 percent whole person functional impairment. But the doctor did not believe Mr. Hawbaker sustained any permanent impairment as a result of his exposure to lead.

(18) At Dr. Koprivica's deposition, the parties admitted into evidence the medical report of Allen J. Parmet, M.D., dated December 16, 1994. Dr. Parmet's report indicates Mr. Hawbaker's lead exposure was not chronic. Further, the report indicates no treatment is required for adults whose blood lead level is as low as Mr. Hawbaker's. The doctor also writes that Mr. Hawbaker is not prohibited from working with lead in the future as long as

his lead level remains below the OSHA standard. The doctor concluded Mr. Hawbaker should have no residual effects from his lead exposure whatsoever and his colitis problems were not caused by lead.

(19) Board-certified family practitioner Wayne O. Wallace, Jr., M.D., testified that his physician assistant, Ellajeon Appel, administered five blood tests to Mr. Hawbaker between September and November 1993. Based on those tests, the doctor concluded Mr. Hawbaker did not need treatment for lead exposure and he would not have any permanent impairment. He also believes Mr. Hawbaker could return to working around lead if he wore the appropriate protective gear. Mr. Hawbaker's last blood test in November 1993 indicated his blood lead level was normal.

(20) At Ellajeon Appel's deposition the parties admitted into evidence various medical records from Dr. Wallace's file. One of the records is an undated report from Ronald Davis, M.D. That report indicates Dr. Davis believes Mr. Hawbaker has a 5 percent whole body functional impairment as the result of the lead exposure according to an unidentified edition of the AMA Guides. But Dr. Davis also indicated neither medical treatment nor work restrictions were indicated at that time.

(21) As indicated above, Dr. Gondring treated Mr. Hawbaker for his left torn rotator cuff and left carpal tunnel syndrome. Using the Fourth Edition of the AMA Guides, the doctor indicated Mr. Hawbaker had a 15 percent permanent impairment to the left upper extremity because of the shoulder injury.

(22) The Administrative Law Judge found Mr. Hawbaker did not sustain either permanent impairment or a reduction in his wage earning ability as a result of lead exposure, and accordingly, denied Mr. Hawbaker's request for permanent partial disability benefits for the lead exposure. The Appeals Board agrees with that conclusion as it is persuaded by the testimony of Drs. Koprivica and Wallace.

(23) After averaging Dr. Gondring's 15 percent rating with Dr. Koprivica's 20 percent rating, the Administrative Law Judge found Mr. Hawbaker had a 17.5 percent permanent impairment to the left upper extremity because of the left shoulder injury. The Appeals Board agrees with that conclusion and adopts it as its own.

(24) The Appeals Board adopts the findings set forth in the Award to the extent they are not inconsistent with the above.

#### **CONCLUSIONS OF LAW**

(1) Mr. Hawbaker provided Turnbull Painting with timely notice and timely written claim for the left shoulder injury.

The Appeals Board finds the left shoulder injury occurred as the result of cumulative trauma. The Appeals Board also finds that the appropriate date of accident would be October 2, 1993, the last day Mr. Hawbaker worked for Turnbull Painting and, therefore, the last day he engaged in the injury producing activity. Mr. Hawbaker provided notice of accidental injury involving the left shoulder to Turnbull Painting on October 6, 1993, at the same time he presented his written claim form. Because that notice was provided within ten days of the date of accident, notice of the left shoulder injury was timely. K.S.A. 44-520.

(2) Mr. Hawbaker failed to prove he provided Turnbull Painting with timely notice of accidental injury for the bilateral carpal tunnel syndrome.

Regardless of the nature of an injury, K.S.A. 44-520 provides that injured workers have only ten days to report an accidental injury to their employers unless the worker can establish just cause, in which case the notice period is extended to 75 days:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .

Because the bilateral carpal tunnel syndrome developed as the result of repetitive mini-traumas sustained through his last day of work on October 2, 1993, that date is the most logical for the date of accident. It is also the last day Mr. Hawbaker would have performed the injury producing activity that caused or contributed to the carpal tunnel syndrome.

Unfortunately, Mr. Hawbaker did not learn he had injured his left arm or had left carpal tunnel syndrome until March 1994. And also unfortunately, Mr. Hawbaker did not advise Turnbull Painting before March 1994 that he had injured his arms or otherwise provide the company with sufficient information that a reasonable person would have reason to believe or be placed on notice that the work activities had caused or were causing an accidental injury to occur.

The record indicates the earliest Turnbull Painting could be deemed to have notice of an arm injury is March 25, 1994, when Dr. Glaser wrote the insurance carrier to advise that Mr. Hawbaker had probable left carpal tunnel syndrome. Therefore, the Appeals Board finds Mr. Hawbaker has failed to prove Turnbull Painting had notice of an accidental injury involving the arms within either 10 days or even 75 days of the date of accident. Because Mr. Hawbaker failed to provide timely notice of accidental injury involving the arms, he may not receive benefits for the bilateral carpal tunnel syndrome condition.

Because of the above finding, the written claim issue is rendered moot.

(3) Mr. Hawbaker failed to prove he provided timely notice of accidental injury for his hearing problems.

The appropriate date of accident for the alleged hearing loss and tinnitus is October 2, 1993, the last day Mr. Hawbaker worked for Turnbull Painting and the last day he would have been exposed to and endured the loud noise associated with his job. But Mr. Hawbaker did not notify the company that he had either a hearing loss or tinnitus that he attributed to his work at Turnbull Painting until he filed the amended application for hearing with the State in June 1996, well beyond the 10- and 75-day notice periods required by K.S.A. 44-520.

Because Mr. Hawbaker failed to provide timely notice of accidental injury for the hearing loss and tinnitus, he is barred from receiving benefits for either of those conditions. That finding also renders the written claim issue moot.

(4) Because the lead exposure did not result in either permanent impairment or reduction in the ability to earn wages, Mr. Hawbaker is not entitled to permanent partial disability benefits for the lead exposure. Also, because the record fails to persuade the Appeals Board that Mr. Hawbaker presently needs medical treatment for the lead exposure, that request for medical benefits should be denied.

Similarly, Mr. Hawbaker is not entitled to any benefits for either the bilateral carpal tunnel syndrome or the hearing loss and tinnitus problems because of the failure to provide timely notice of accident. But Mr. Hawbaker is entitled to receive permanent partial disability benefits for the left shoulder injury based upon the 17.5 percent functional impairment rating to the upper extremity. Because the appropriate date of accident is October 2, 1993, Mr. Hawbaker's permanent partial disability is computed following K.S.A. 44-510d, the "scheduled" injury statute. That statute provides that 225 is the maximum number of weeks for a shoulder injury.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated June 5, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Terrance R. Hawbaker, and against the respondent, James R. Turnbull Painting, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred October 2, 1993, and based on an average weekly wage of \$672.17.

Claimant is entitled to 54 weeks of temporary total disability compensation at the rate of \$313 per week or \$16,902, followed by 29.93 weeks at the rate of \$313 per week or \$9,368.09, for a 17.5% permanent partial disability to the left upper extremity, including the shoulder, for a scheduled injury, making a total award of \$26,270.09, all of which is due and payable in one lump sum, less any amounts previously paid.

Mr. Hawbaker may request additional medical benefits upon proper application to the Director.

The remaining orders as set forth in the Award are adopted by the Appeals Board to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Henry O. Boaten, Topeka, KS  
Michael W. Downing, Kansas City, MO  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director